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SUPREME COURT, U.S.

Nos. 82-5279 and 82-5331

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ARTHUR DIXSON, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES LEE HINTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER DIXSON

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Respondent characterizes the test adopted by the Second Circuit Court of Appeals for determining who is a "public official" under 18 U.S.C. 201 as "inapposite." Response, p. 5. Then, without further adieu, respondent proceeds to opt for the broad and ambiguous tests adopted by the Seventh Circuit in the instant case. Id. et seq. Only, however, by ignoring the Second Circuit's analysis and rulings in United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975), and United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976), and also by ignoring the adoption of the Second Circuit test by the Ninth Circuit Court of Appeals in United States v. Hollingshead, 672 F.2d 751 (9th Cir. 1982), can respondent conclude that no conflict exists among the circuits.

(i) In Loschiavo, 531 F.2d at 661, the court states:

> "The type of public project involved, or the amount of federal funding entailed, may be important in applying other parts of the statute ... but for the purpose of deciding Morales' status as a 'public official' under section 201(a), it is not the aspects of the particular project which are of greatest significance, but the character and attributes of his employment relationship, if any, with the federal government."

The Ninth Circuit in Hollingshead, 672 F.2d at 753 and 754, gives a concise articulation of the Second Circuit test in the following words:

> "Since the bribed Model City Official [in Del Toro and Loschiavo] 1) was a city employee; 2) was carrying out tasks delegated by another city employee; and 3) had his recommendations screened by

three city agencies prior to HUD approval, the court found that he was entirely under state supervision and authority pursuant to the Model City Program."

...

"[Also,] [i]n Loschiavo and Del Toro ... the city official never dealt directly with HUD."

(ii) Applying the Second Circuit test, adopted also by the Ninth Circuit, to petitioners, their convictions would have to be reversed.

(a) Petitioners (as employees of UNI, a community based, non-profit corporation, under contract witht he City of Peoria, Illinois, to administer a Community Development Block grant for it) had no employmenet relationship with the City of Peoria, let alone with the federal government.

(b) Petitioners were employees of UNI, but would not be subject to section 201 as public officials even if they had been employees of the City of Peoria.

(c) Petitioners carried out tasks delegated to them by members of the Board of Directors of UNI (Tr. 227, 231), but would not be subject to section 201 even if they were carrying out tasks delegated to them by employees of the City of Peoria.

(d) Petitioners never dealt directly or in any way with the City of Peoria, let alone HUD or the federal government.

(iii) Accordingly, regardless of whether the Seventh Circuit in its decision is correct in finding that the Community Development Block Grant program "involved substantially greater federal eligibility performance and compliance standards, more direct supervision, more extensive reporting requirements than the [Model Cities] program at issue in Loschiavo and Del Toro (Id. at A3-A6)," Response,

p. 6, the Second Circuit test, which was adopted by the Ninth Circuit, and implicitly by the First Circuit,* mandates the reversal of their convictions. If petitioners had been employees of the City of Peoria in administering funds of the Model Cities Program, they would not be "public officials" under section 201 according to the Second Circuit test. A fortiori, as employees of UNI and with no contact or dealings with the City of Peoria in this capacity, they would not be subject to section 201.

(iv) As Dixson's original petition has argued, this Court should grant his writ of certiorari to resolve the conflict among the circuits and to remedy by its ruling potential constitutional infirmities in the Seventh Circuit's ambiguous and expansive definition of who constitutes a "public offical" under section 201. Petition 82-5279, pp. 8-10.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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*In Slater v. United States, 562 F.2d 58, 61 (1st Cir. 1976), the court cited Del Toro as authority for the proposition that "it is doubtful" that appellant, who had served as the inspector of the work of contractors hired to carry out repairs financed by a Model Cities grant to the City of Boston, could be convicted under 18 U.S.C. 201.

AFFIDAVIT OF SERVICE

TO: Solicitor General
Department of Justice
Washington, D.C. 20530

I, Donald V. Morano, being duly sworn on oath, depose and state that I served the foregoing Reply Petition for a Writ of Certiorari, in accordance with Rule 28(c), to the above-mentioned individual at his respective address by depositing in the United States mail at the U.S. Postal Station, Dearborn & Adams, Chicago, Illinois, 60603, a true and correct copy thereof in a sealed envelope, postage prepaid, on the 29th day of November, 1982.

Donald V. Morano

Subscribed and sworn to
before me this 29th day
of November, 1982.

Barbara M. Bost
Notary Public